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STATUTE

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 12

UNITED STATES OF AMERICA, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (R. 32) is reported in 132 F. Supp. 34. The report of the Interstate Commerce Commission (R. 7) is reported in 289 I.C.C. 49.

JURISDICTION

The judgment of the three-judge district court was entered on June 28, 1955 (R. 36), and the notice of appeal was filed in that court on August 26, 1955 (R. 37). Probable jurisdiction was noted on January 9, 1956 (R. 38). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b).

STATUTE INVOLVED

Sections 1(6), 2, 6(1), 6(7), and 6(8) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1(6), 2, 6(1), 6(7), and 6(8), provide in pertinent part:

§ 1(6). It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce * * * just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

§ 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person

or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

§ 6(1). That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * *.

§ 6(7). No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

§ 6(8). In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. * * *.

QUESTION PRESENTED

Whether the Commission properly concluded that the refusal of the railroads to compensate the Army for wharfage and handling on Army freight moving over Army piers and unloaded under Army direction and control, when the railroads provided ample wharfage and handling services over public piers, did not subject

the Government to unjust discrimination in violation of Section 2 of the Interstate Commerce Act and was not an unreasonable practice in violation of Section 1(6).

STATEMENT

On November 20, 1951, appellant filed a complaint (R. 39) with the Interstate Commerce Commission, alleging that since May 1, 1951, the railroads have refused to pay it an allowance or otherwise to absorb the cost of wharfage and handling on military freight moving over the Army Base piers at Norfolk, Virginia, subjecting it to unjust and unreasonable rates and charges for transportation in violation of Sections 1, 2, 3, and 6 of the Interstate Commerce Act. The complaint sought an administrative finding to the above effect, a cease and desist order, and such other relief as the Commission might consider appropriate. After hearing, the Commission issued its report on June 1, 1953, dismissing the complaint. *United States* v. *Aberdeen & Rockfish R. R. Co.*, 289 I.C.C. 49 (R. 7). The Commission found that under the applicable tariffs the railroads had no obligation to provide wharfage and handling, or to make payments in lieu thereof, to the Army under the circumstances of this case (R. 16-21), that the refusal to make the payments sought is not unreasonable (R. 21), and that the Army has been accorded the same treatment as that accorded any other shipper under similar circumstances (R. 19, 22). The vote of the Commission was eight to one, Commissioner Splawn not voting, Commissioner Lee being absent, and Chairman Alldredge dissenting (R. 24-25).

Upon review, the majority of a three-judge district court (District Judges Pine and Keech) sustained the

order of the Commission, holding that it is supported by adequate findings, which are, in turn, supported by substantial evidence; that the plaintiff has not been accorded different treatment from any other shipper under the same or similar circumstances and has not been subjected to any unlawful discrimination; and that the plaintiff has not been subjected to the payment of rates and charges which were or are unjust, unreasonable, or otherwise unlawful (R. 32). Circuit Judge Bazelon dissented (R. 35).

THE FACTUAL BACKGROUND

Appellant does not contend that the Commission's findings of fact are not supported by substantial evidence or are otherwise not justified by the evidence introduced at the hearing. From the report of the Commission, the following facts appear:

The Army Base property at Norfolk, including all railroad tracks, is owned by the United States Government and has been under the management of the Maritime Commission (R. 9). For some time prior to May 1, 1951, Army Base piers 1 and 2, and portions of the surrounding property, had been under lease to Norfolk Terminals, Division of Stevenson & Young, Inc., and were operated by it as a public terminal (R. 9). Stevenson and Young was employed by the railroads serving Norfolk as their agent for the unloading of export freight, both commercial and military, to the extent that the railroads obligated themselves in their tariffs to perform that service, receiving compensation at the rate of 75 cents a ton and 25 cents a ton for wharfage (R. 12).

On May 1, 1951, the lease to Stevenson and Young was revoked and the Army took possession of the piers under a permit granted by the Maritime Administra-

tion (R. 9). At the same time, the Army sub-permitted portions of the Army Base to the Maritime Administration, which made space available to Stevenson and Young for operation of a public terminal for commercial traffic (R. 9). The facilities which Stevenson and Young were permitted to use for the conduct of commercial operations were very limited (R. 12) and were subject to change dependent upon Army requirements (R. 9). On this portion of the Base, Stevenson and Young continued to act as agent for the railroads in the performance of wharfage and handling service on shipments (R. 12). The freight was in the possession of Stevenson and Young as agent for the railroads, and the shipper was at no time in possession between the time the freight reached the base and the time it was placed at shipside for loading to the vessel (R. 12).

The Army Base at Norfolk was reactivated and taken over by the Army to meet the requirements of United States forces and supply bases overseas and to service a special engineering project known as "Blue Jay" (R. 9, 11). Based on past experience, the Army had determined that the complexity of such an operation, including the large amount of prestorage planning, the precise overseas requirements, the varied nature of the freight and special handling required by many items, and the maintenance of security, requires that it be carried on by military personnel and civilian Government employees under the absolute control of the Army (R. 11, 15, 20).[1]

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[1] There have been available to the railroads port facilities in Norfolk more than ample to handle all the military traffic moving over the Army Base on and since May 1, 1951 (R. 21). But the Army chose to have its freight delivered into its possession and control on its own pier facilities for reasons of its own, however meritorious or necessary.

After the Army took possession of the piers, Stevenson and Young was employed under contract with the Army to perform the necessary terminal services on military freight (R. 12) while certain features of the "Blue Jay" project were handled over a separate, highly secret area of the Base by a firm of contractors known as North Atlantic Constructors under contract with the Army Engineers (R. 15). All military freight was stored on and handled over wharf and other properties on the Army Base which were under the exclusive control of the Army and, after delivery to the base, was in the possession of and under the exclusive control of the Army (R. 18-19).

SUMMARY OF ARGUMENT

I.

The Commission properly concluded that the refusal of the railroads to make the same payments to the Army for providing its own wharf and handling its own freight as they make to their agent for the unloading of railroad freight at a public pier did not subject the Government to unjust discrimination in violation of Section 2 of the Interstate Commerce Act and was not an unreasonable practice in violation of Section 1(6), since the railroads had no obligation with respect to wharfage and handling under the circumstances of this case and the Army neither paid for a service which it did not receive nor was treated differently than any other shipper similarly situated.

A. Under the applicable tariffs, the railroads assumed no obligation to provide wharfage and handling to the Army under the circumstances of this case, nor were they required or authorized to do so. The refusal

of the railroads to make payment to the Army for providing its own piers and unloading its own freight was not unjustly discriminatory or unreasonable.

1. Two different kinds of tariffs are involved here, the export rate tariffs published by the line-haul carriers and the terminal tariffs published only by the railroads serving the Port of Norfolk. The sole reference to wharfage and handling is contained in the latter. It is limited to public piers and actual performance, and does not encompass the payment of allowances to shippers. The typical terminal tariff limits wharfage and handling to (1) export freight moving over piers operated by Stevenson and Young as a public railroad pier where (2) Stevenson and Young provides the services as agent for the railroads on other than its own freight.

As found by the Commission, the Army freight was delivered into the possession and control of the Army, was handled over the Army's own piers, and was unloaded by the Army's agent; hence, the Army was not entitled to wharfage and handling under the terminal tariffs.

2. The export rate tariffs make no reference to wharfage and handling. Nor do they of themselves include the services. *Norfolk Port Commission* v. *Chesapeake & Ohio Ry. Co.*, 159 I.C.C. 169; *City of Newark* v. *Pennsylvania R. Co.*, 182 I.C.C. 51; *Chamber of Commerce of City of Newark* v. *Pennsylvania R. Co.*, 206 I.C.C. 555.

Appellant's own tariff witness agreed that the export rates are made without regard to the wharfage and handling services offered by the terminal lines, and uncontroverted testimony established that the export rates contain no element of compensation for port serv-

ices. Thus, appellant paid for no service which it did not receive.

3. The Commission found that the Army was treated exactly like any other shipper similarly situated and that no other shipper received, or would have been entitled to, compensation for providing his own wharf and unloading his own freight. This conclusion was amply supported by the evidence. It is consistent with prior rulings of the Commission, which has repeatedly held that export freight coming into the possession of a shipper was entitled to neither export rates nor port services and that it would be unlawful to accord them. *McCormick Warehouse Co.* v. *Pennsylvania R. Co.*, 191 I.C.C. 727; *Rukert Terminals Corp.* v. *Baltimore & Ohio R. Co.*, 283 I.C.C. 5, 286 I.C.C. 485.

Appellant contends that the Commission's conclusion is unsound because the piers used by the Army were not private. But, as the Commission found, the military traffic was delivered into the Army's possession and was handled by the Army over wharf and other properties on the Army Base which were under the exclusive control of the Army. In these circumstances, the railroads had no obligation to accord the port services or to compensate the Army for providing its own.

The practice of providing wharfage and handling without additional charge only on freight handled over railroad piers by railroad employees or over public piers by agents of the railroads is not arbitrary or otherwise unreasonable. It is rooted in sound operating practice, and is a proper method of confining the practice to its legitimate purpose and keeping it within reasonable bounds.

B. Appellant contends that when the railroads paid their agent $1.00 per ton for providing wharfage and

handling on some freight and refused to pay a like amount to the Army for handling its own freight on its own piers, they received greater compensation from the Army than from the other shippers for performing a like and contemporaneous transportation service, i.e., transportation of the freight to the piers (Br. 20-25). This argument is based on a misconstruction of Section 2, which has as its purpose the prohibition of any rebate or other device by which two shippers are compelled to "pay different prices" for like transportation service. *Interstate Commerce Commission* v. *Baltimore & Ohio R.R. Co.*, 225 U.S. 326, 341. It does not require that the carrier net the same amount from each shipper.

C. Even if the railroads had an obligation with respect to wharfage and handling under the line-haul export rates, they were released from the obligation when the nature of the Army's operation was such as to prevent performance and render the ordinary service of the railroads unsatisfactory.

As the Commission found, the special requirements of the Army's operation made it necessary that the handling of its freight be done under its control, at its own pier facilities, to suit its own convenience, and the Army did not wish to use the railroads' pier facilities. Thus, the railroads have no obligation to make allowances for unloading and wharfage, for carriers have a right to furnish whatever transportation service they are required to furnish. *Atchison, T. & S.F. Ry. Co.* v. *United States*, 232 U.S. 199.

The Commission has consistently held, as it did here, that when a shipper elects to perform a service and when the service of the carrier would not be satisfactory to the shipper or meet its needs and convenience, the carrier has no obligation to make an allowance to

the shipper for performing the service. *Allowances or Divisions Received by Texas Gulf Sulphur Co.*, 96 I.C.C. 371, 376; *Propriety of Operating Practices—Terminal Services*, 209 I.C.C. 11, 29. The Court has recognized the propriety of the above rule and has consistently upheld the Commission in its application. *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402; *United States* v. *United States Smelting, Refining and Mining Co.*, 339 U.S. 186.

II

United States v. *Interstate Commerce Commission*, 198 F. 2d 958, the so-called first *Norfolk* case, upon which appellant places great reliance, is clearly distinguishable from the present case. Basic to the decision of the Court of Appeals was its view that under the terms of the applicable terminal tariff in that case, the Army was entitled to wharfage and handling even after it took over the piers. The court viewed the findings of the Commission as attempts to justify a departure from the obligation assumed in the tariffs. As the Commission and the District Court recognized in the present case, the tariffs in the two cases differ materially and it is clear that here the obligation of the railroads to provide wharfage and handling, as defined in their terminal tariffs, did not survive the Army's action in taking over the piers and handling its own freight.

ARGUMENT

I

The Refusal of the Railroads to Make the Same Payments to the Army for Providing Its Own Wharf and Handling Its Own Freight as They Make to Their Agent for the Unloading of Railroad Freight at a Public Pier Did Not Subject the Government to Unjust Discrimination in Violation of Section 2 of the Interstate Commerce Act, and Was Not an Unreasonable Practice in Violation of Section 1(6)

As a general rule, the unloading of carload freight is the obligation of the shipper and not of the carrier. *Merchants Warehouse Co.* v. *United States,* 283 U.S. 501, 506; *Pennsylvania R. Co.* v. *Kittaning Co.,* 253 U.S. 319, 323; *Loading and Unloading Carload Freight,* 101 I.C.C. 394, 396; *McCormick Warehouse Co.* v. *Pennsylvania R. Co.,* 148 I.C.C. 299, 300. However, without any change in the applicable line-haul rates, the railroads may voluntarily assume the obligation under conditions specified in their tariffs, and this does not *ipso facto* result in unjust discrimination so long as all shippers in the same circumstances are treated alike. *Barringer & Co.* v. *United States,* 319 U.S. 1. Whether discrimination under Section 2 of the Interstate Commerce Act exists is a question of fact to be determined by the Commission and its determination will not be disturbed unless it is unsupported by evidence or without rational basis, or rests on an erroneous construction of the Act. *Barringer & Co.* v. *United States, supra,* at p. 6. The Commission found absence of discrimination in this case (R. 24).

To place Norfolk on a competitive basis with other ports where railroads operate their own piers, the railroads serving Norfolk have provided wharf facilities and services by employing public terminal operators to act as their agents (R. 19). Such services are pro-

vided only to the extent defined in the terminal tariffs of the railroads, which apply to all shippers, military as well as commercial, alike (R. 15-16), and deviations from these tariffs would be a violation of Section 6(7) of the Act (R. 21-22). Under the terminal tariffs, wharfage and handling is only provided on shipments actually handled by railroad employees or agents on public piers (R. 15-17), and is not provided for shippers which have their own wharf facilities and take possession of their shipments when delivered to their own facilities, as does the Army (R. 19). The obligation undertaken by the railroads is an obligation to provide the port service under the stated conditions, and there is no provision for the granting of allowances in lieu of performance (R. 16, 22). Because the performance is furnished through the agency of a public terminal operator to whom payment is made by the railroad, in this case Stevenson and Young, does not alter this fact.

The issue here is whether the refusal of the railroads to pay allowances to the Army for wharfage and handling where not warranted or authorized under the applicable tariffs is unjustly discriminatory under Section 2 of the Act, or an unreasonable practice in violation of Section 1(6).

A. *Under the Applicable Tariffs, the Railroads Were Neither Required Nor Authorized to Provide Wharfage and Handling to the Army Under the Circumstances of This Case and Their Refusal to Make Payment in Lieu of Performance Was Not Unjustly Discriminatory or Unreasonable*

1. The terminal tariffs, which are the sole source of the obligation to provide wharfage and handling, do not require or authorize the railroads to pro-

vide such services to the Army under the circumstances of this case

Two different kinds of tariffs are involved in this case, the export rate tariffs published by the line-haul carriers and the terminal tariffs published only by the railroads serving the port of Norfolk. As will be demonstrated later in this brief, the export rate tariffs contain no reference to any obligation with respect to wharfage and handling. The terminal tariffs contain the sole reference to wharfage and handling and this obligation is limited, as it always is, to public piers and actual performance and does not encompass the payment of allowances by the railroads or their agent. For example, the terminal tariff of the Pennsylvania Railroad effective February 1, 1950 (I.C.C. No. 3007, on file with the Commission) (Ex. 30; R. 483) [2] which was

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[2] Except as indicated in Items 375, 380 and 385 and unless or otherwise provided in this tariff or in other tariffs lawfully on file with the Interstate Commerce Commission, wharfage and handling charges published in Norfolk and Portsmouth Belt Line Railroad Company Tariff No. 6-J, I.C.C. 105, will be included in the freight rate to or from Norfolk, Va., on export, import, intercoastal and coastwise freight traffic, any quantity, other than traffic moving on joint through rates via regular coastwise lines operating to and from North Atlantic ports, subject to the following conditions:

(a) When the freight rates from Norfolk, Va., on inbound traffic or to Norfolk, Va., on outbound traffic is 19 cents per 100 pounds (Rule 53) or higher.

(b) When receipt from or delivery to vessel is in rail service over wharf properties owned or leased by Norfolk Terminals Division of Stevenson & Young, Inc., and operated by Norfolk Terminals Division of Stevenson & Young, Inc., as a public terminal facility of the rail carriers.

(c) When Norfolk Terminals Division of Stevenson & Young, Inc., acting in the capacity of a public wharfinger, furnishes wharfage facilities and performs handling services for account of and as agent for the rail carriers on traffic that is neither consigned to or from nor owned or controlled by Norfolk Terminals Division of Stevenson & Young, Inc.

used as representative by appellant's witness (R. 205-6) and found to be typical by the Commission (R. 16), provides that wharfage and handling charges will be included in the export rates when (1) export freight is delivered over wharf properties owned or leased by Stevenson and Young and operated by it as a public terminal facility of the rail carriers, and (2) Stevenson and Young provides the services for the account of and as agent for the rail carriers on traffic that is neither consigned to nor owned or controlled by Stevenson and Young.

In concluding that the railroads had not failed to observe the provisions of their terminal tariffs in refusing to provide wharfage and handling for the Army (R. 19), the Commission found (R. 18):

> The facts are that on May 1, 1951, and thereafter to the date of the hearing herein, only commercial traffic for export was handled over wharf properties leased by Norfolk Terminals, Division of Stevenson and Young, Inc., and operated by that company as a public terminal facility of the rail carriers on the Army Base at Norfolk. . . . No military traffic was stored on or handled over any wharf property under lease to the Stevenson company for commercial traffic at any time during that period. At all times during that period, military traffic was stored on and handled over wharf and other properties on the Army Base which were under the exclusive control of the Army.

The Commission further found that "all such export military traffic, after delivery to the base, was in the possession of and under the exclusive control of the

Army and was handled over wharf facilities under exclusive permit to the Army, and the unloading services were performed by labor furnished by the agent of the Army and not by an agent for the rail carriers." (R. 18-19).

The above findings are solidly based on evidence of record which is not challenged by appellant in this proceeding.[3] Consequently, appellant has abandoned its position before the Commission that its shipments met the requirements of the terminal tariffs[4] (Br. 37-39).[5] Appellant now contends simply that it has been subjected to discriminatory and unreasonable treatment under cover of the tariffs. Relying heavily on the fact that the railroads in this instance do not themselves physically provide wharfage and handling but compensate their agent for doing so on their behalf, appellant argues variously that the railroads received greater compensation from the Army than from other shippers for performing a like and contemporaneous transportation service under substantially similar circumstances in violation of Section 2 (Br. 20-25); that the export rates contemplate wharfage and handling and include a charge therefor so that the railroads must either provide the services or refund to the shippers an amount equal to the payments which the carriers make to their

[3] A caveat should perhaps be added at this point since, while it does not contend that the Commission's findings of fact are not supported by substantial evidence or are otherwise unwarranted, appellant does quarrel with the Commission's finding that after May 1, 1951, only a portion of the Army Base was made available to Stevenson and Young for use as a public terminal and the major portion was retained by the Army for its exclusive use (Br. 29-30).

[4] Appellant's argument along this line is fully set out in the Commission's report (R. 17-19).

[5] See also appellant's Brief In Opposition to Motion to Affirm, pp. 2 and 4.

agent for performing such services (Br. 25-28); that, as applied to the Army's situation, the conclusion of the Commission that the Army was not subjected to unjust discrimination is not sound (Br. 28-37); and that the limitations in the terminal tariffs are unreasonable in violation of Section 1(6) (Br. 40-43).[6]

2. The export rate tariffs contain no obligation with respect to wharfage and handling and contain no charge for such services.

Contrary to the testimony of its own witness (R. 248-9, 251-2, 254), appellant argues that the export rates include wharfage and handling (Br. 25-27). The export rates make no reference whatever to wharfage and handling, as may be illustrated by Tariff 80-C, I.C.C. 694, C. W. Boin Agent, from points in Trunk Line Territory to Norfolk, Va., effective April 10, 1950:[7]

Application of Export Rates

Rate Basis Numbers named in this Section will apply on property consigned for export to all destinations not located in the Continental United States of America (including Alaska), Dominion of Can-

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[6] Before the district court, appellant relied on still another theory. It contended that under the export tariffs, as a part of their transportation service, the railroads undertook to provide wharfage and handling, and that since the service was provided by the Army, the Government is entitled to allowances under Section 15(13) of the Act. In this position, appellant was inconsistent as it still sought the payments made by the railroads to their agent under contract whereas allowances under Section 15(13) are refunds of a portion of the freight rate to a shipper for performing part of the railroad transportation obligation and are the reasonable value of the services performed by the Army, not exceeding cost.

[7] Appellant did not print any of the export rate tariffs. However, the Boin tariff is referred to in Exhibit 10 at page 476 of the record and is typical of those tariffs.

ada, Islands of Miquelon and St. Pierre, Newfoundland, when exported direct from port stations named on pages 5 and 6 of this Tariff, as amended, will only apply, except as otherwise provided herein on traffic which does not leave the possession of the carrier and is delivered by the Atlantic Port Terminal Carriers direct to the steamer or steamer's docks upon arrival at the port or after storage or transit has been accorded by the carriers under tariffs which permit the application of the export rates, and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply, which traffic is handled direct from carrier's stations to steamship docks on which required proof of exportation or transshipment is given.

Appellant's tariff witness admitted that no obligation as to these services can be found in the rate tariffs, of which the above is typical, and that it is necessary to refer to the terminal tariffs of the port lines to find the obligation (R. 249, 251). The language of the above tariff bears this out. There is no reference to wharfage and handling. For this, the terminal tariffs published by the railroads serving the Port of Norfolk must be consulted.

Numerous prior decisions of the Commission establish that the export rates do not of themselves include wharfage and handling. In *Norfolk Port Commission* v. *Chesapeake & Ohio R. Co.*, 159 I.C.C. 169 (1929), the railroad was required to grant export rates to the Army Base operated as a public terminal but not wharfage and handling services. This is a clear holding that the export rates do not include these services. In fact,

while the Chesapeake and Ohio publishes the same export rates as the other railroads, it does not provide wharfage and handling (R. 212).

In *City of Newark* v. *Pennsylvania R. Co.*, 182 I.C.C. 51 (1932), the Commission held that the withholding of handling service on railroad piers in Newark while performing such service on railroad piers at certain other ports prejudiced the Port of Newark, but the prejudice was removed by discontinuing the service at the other ports. Since the rates remained the same, here is a clear indication that export rates do not necessarily include the port services. In another Newark case, *Chamber of Commerce of City of Newark, N. J.* v. *Pennsylvania R. Co.*, 206 I.C.C. 555 (1935), the Commission held that the railroads are not required to unload export freight on piers controlled by the shipper. To the same effect, see *Borough of Edgewater, N. J.* v. *Arcade & Attica R. Corp.*, 280 I.C.C. 121, 125-6 (1951). In all of these cases, the result would have been otherwise were the terminal services paid for and required to be included in the export rates.

Appellant has referred the Court to no evidence tending to establish that the line-haul export rates included a charge for port services, nor can it. In fact, appellant's tariff witness agreed that the export rates are made without regard to the wharfage and handling services offered by the terminal lines (R. 251-252, 254). This is underscored by the fact, admitted by the same witness (R. 248), that the line-haul carriers which do not reach the Port of Norfolk, and do not participate in the port services, have no interest in this proceeding, although they participate in the transportation of Army shipments and in the publication of the line-haul rates (R. 16).

The evidence is conclusive and uncontroverted that the rates contain no element of compensation for port services and that the level of the rates is not affected by the granting or withholding of the port services (R. 220-222, 237, 244-245, 316, 331).[8] Thus, appellant paid for no service which it did not receive.

Later in its brief, appellant erects a straw man which it promptly understakes to demolish. Appellant imputes to the Commission the position that the Army was not entitled to allowances for wharfage and handling because it received export rates solely by a concession which did not include the obligation (Br. 34-35). Appellant then proceeds to argue that the concession was not a concession at all; hence, the Army was entitled to the port services included in the export rates.

But the Commission's report only referred to the consession in its discussion of the contention that the railroad's refusal to absorb wharfage and handling charges was unreasonable (R. 21). It is sufficient to note here that the export rates carried with them no obligation with respect to wharfage and handling (*supra*, pp. 18-21), regardless of whether the Army received the export rates by concession or were entitled to them as a matter of right.

Before the Commission, appellant has not assailed the level of the line-haul rates on the theory that they

[8] Contrary to appellant's allegation (Br. 27), the provision without additional charge of wharfage and handling *on public piers, available to all who want them, and specified in their filed tariffs* is not a Section 6 violation. See *Barringer & Co.* v. *United States*, 319 U.S. 1, 13. The statement quoted by appellant (Br. 27) from *United States* v. *Wabash R. Co.*, 321 U.S. 403, 410, had reference to terminal services provided an industry and not set forth in the filed tariffs. If the railroads should depart from their filed tariffs in the present case and make allowance to the Army, as the Government seeks here, the *Wabash* case would certainly apply.

are unreasonably high where port services are not afforded. It has not asked the Commission to pass upon the validity of the line-haul rates (See *Barringer & Co.* v. *United States*, 319 U.S. 1, 10), nor has it sought to introduce evidence on this point. Indeed, it has disclaimed any such intention (R. 19). This being the case, and it being clear that appellant was not entitled to the port services under the applicable tariffs and was not charged for services which it did not receive, appellant can only prevail if the refusal of the railroads to pay for wharfage and handling on Army freight accorded the Army different treatment than other shippers similarly situated or was unreasonable.

3. The refusal of the railroads to pay for wharfage and handling on Army freight was neither unjustly discriminatory nor unreasonable

Under Section 2 of the Act, unjust discrimination occurs only when there is different treatment "under substantially similar circumstances and conditions." In rejecting the Army's claim of unjust discrimination, the Commission found that the Army was treated exactly like any other shipper similarly situated in that no other shipper would have been entitled to compensation for providing his own wharf and unloading his own freight (R. 19). The evidence supports this conclusion and it is consistent with all other prior rulings of the Commission with respect to port practices.

Moreover, not only was the Army not the victim of discrimination, it was given preferential treatment in this case. In 1941, at the "urgent request of the Secretaries of War and Navy," the railroads extended the lower export rates to freight coming into the Army's possession by a concession which has resulted in a con-

siderable saving to the Army and a commensurate loss of revenue to the railroads (R. 21). The Army was not entitled to such rates as a matter of right as freight coming into the possession of a shipper is entitled to neither export rates nor port services, and it is unlawful to accord them. *McCormick Warehouse Co.* v. *Pennsylvania R. Co.*, 191 I.C.C. 727; *Rukert Terminals Corp.* v. *Baltimore & Ohio R. Co.*, 283 I.C.C. 5 and 286 I.C.C. 485. This was done under the authority of Section 22 of the Act, which permits, but does not require, carriers to charge the Government less than the established rate.[9] The railroads have also given free additional spotting service to the Army for which a commercial shipper would have had to pay (R. 13).

In seeking allowances for wharfage and handling, the Army is seeking further preferential treatment. As we have pointed out, there is no obligation or authority under the tariffs to make the payments to which appellant claims it is entitled. Such payments to a private shipper would constitute a deviation from the tariffs in violation of Section 6(7) of the Act (R. 21-22). It is certainly not unjust or unreasonable to deny them to the Government.

Appellant contends that the Commission's conclusion is unsound because the piers used by the Army were not private, and seeks to convey the impression that all of the facilities on the Army Base piers were as available to the railroads for commercial traffic as they were to the Army for military freight (R. 29-33).

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[9] The record does not support appellant's statements that this was merely a recognition of the obvious export nature of the freight and that the Army furnished proof of exportation (Br. 34). There is evidence that proof of exportation was frequently lacking and that much of the freight was for domestic use and not for export (R. 322-323, 332, 342).

This is contrary to the facts as found by the Commission (R. 9, 12, 18) and is not in accord with the evidence. For example, it will be remembered that on April 30, 1951, the Army received possession of the piers under permit from the Maritime Commission (Ex. 2; R. 383); that the Army, in turn, subpermitted back to the Maritime Commission certain designated portions of the Army Base piers subject to Army needs and requirements (Ex. 2; R. 388); and that the facilities made available to Stevenson and Young for commercial operation came from the subpermitted portions, according to the testimony of appellant's own witnesses (R. 45, 63).[10] The advertisements of Stevenson and Young, referred to by appellant (Br. 30), clearly indicate that only certain facilities were available to it for commercial use (Ex. 9, Part 7; R. 454 C-D-E). The record conclusively shows that the major portion of the Army Base piers, including the warehousing and open storage facilities there, were the private facilities of the Army used exclusively for its operations,

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[10] Appellant's witness, Colonel Weed, Commanding Officer at the Army Base piers (R. 48), introduced into evidence as Exhibit 3 a drawing of the property in which the area and facilities permitted to the Army were outlined in brown and the smaller portion and more limited facilities subpermitted back to the Maritime Administration were outlined in red and green (R. 53-57). The red represented the space and facilities made available to Stevenson and Young for their commercial operation and the green represented a portion retained by the Maritime Administration for its own purposes (R. 63-64). Although this exhibit was not made a part of the record before this Court, it is clear from the testimony concerning it that the particular areas used by Stevenson and Young as a public terminal operation for the railroads were those marked in red consisting of a portion of Pier 1, and Warehouse No. 3, subject to any demands the Army might make upon those facilities (R. 82-84), and that the space and facilities devoted to the handling of Army freight was the remainder (R. 60, 63).

and that the Army's shipments were handled under its control.[11]

We submit that the distinction between the Army and industrial shippers drawn by the court of appeals in *United States* v. *Interstate Commerce Commission*, 198 F. 2d 958, 970, and quoted in appellant's brief (Br. 31), is not valid.[12] Because the Army controlled its shipments over its own piers for military rather than commercial purposes, should make no difference.[13] It is no less true that, like the industrial shipper which operates its own pier, the Army operated its own piers for reasons of its own convenience. If the commercial purpose-military purpose dichotomy were valid, no military pier could be regarded as a private pier even were it entirely closed to the public. Certainly, it is

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[11] The Commission found that the Army freight required complex handling necessitating that it be performed under the exclusive control of the Army. These findings are summarized in our Statement (*supra*, p. 7) and are amply supported by the testimony of appellant's own witnesses (R. 51-52, 65-66, 78-79, 102-103, 123, 125, 177-179.

[12] As the full quote from 198 F. 2d at 970, shows, the court was influenced by its impression that public facilities were inadequate to accommodate the volume of military traffic. Whatever deficiency the record in that case contained in this respect, it has been remedied here. The Commission found (R. 21), and uncontroverted evidence of record shows (R. 337-341), that port facilities available to the railroads were more than ample to handle all military traffic moving over the Army Base on and since May 1, 1951.

[13] Appellant's reliance on Section 6(8) of the Act (Br. 31) is inapposite. Appellant has not shown that any "demand of the President of the United States" was ever made that "preference and precedence shall * * * be given, over all other traffic, for the transportation of troops and material of war." There is no evidence that the action of the railroads in refusing to accord wharfage and handling, or to pay the Army therefor, in any way delayed or impeded the flow of military traffic through the Port of Norfolk. Moreover, by its very terms, Section 6(8) relates solely to the physical movement of traffic.

not the purpose which is relevant, but the conditions of operation.

There is no magic in the term "private pier." It is merely a shorthand way of describing a pier facility which is operated by a shipper exclusively for his own shipments and is not open to the public. The significant point about such a pier operation, so far as the wharfage and handling obligation of the railroads here is concerned, is that the shipper takes possession of the freight and handles it in his own way to suit his own convenience. As we pointed out earlier in this brief (*supra*, pp. 16-17), the Commission also found that "all such military traffic, after delivery to the base, was in the possession of the Army and was handled over wharf facilities under exclusive permit to the Army, and the unloading services were performed by labor furnished by the agent of the Army and not by an agent for the rail carriers." (R. 18-19) This being the case, the railroads would have had no obligation, under their tariffs or otherwise, to provide wharfage and handling on Army freight even had the Army allowed Stevenson and Young to carry on a commercial operation with respect to *non-military* freight over the length and breadth of the Army's piers with full use of any and all facilities there.[14]

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[14] *Elimination of New York, N. H. and H. R. Pier Stations*, 255 I.C.C. 305, cited at page 30 of appellant's brief, is not to the contrary. As the Commission pointed out in *United States* v. *Aberdeen & Rockfish Railroad Co.*, 294 I.C.C. 203, at p. 220, the issues in *Elimination of New York, N. H. and H. R. Pier Stations*, concerned the lawfulness of a proposal of the railroad to be relieved of the expense of loading and unloading *commercial* freight which it was permitted to handle in wartime over piers owned or leased and used by the Government in handling its own freight, and the Commission held that the railroad was still obligated to handle such *commercial*

Appellant argues that the refusal to pay the Army for providing its own piers and unloading its own freight constitutes unlawful discrimination (Br. 38-39) and unreasonable practice (Br. 40-43) [15] because it results from the enforcement of an arbitrary rule. But there are practical reasons for the practice which demonstrate that it has a rational basis and is not arbitrary. As the railroad's witness testified, the historical reason for providing the services on public piers is that the owner of the freight was in no position to perform the services himself (R. 237). A further reason is found in the understandable desire of the railroads to release cars instead of holding them on piers to await the arrival of ships (R. 237). The limitation to public piers where the services may be performed to suit the convenience of the railroads is also justified by sound practice. When the railroads provide adequate facilities open to all shippers, they should not be required to operate on private facilities at the convenience of a particular shipper; neither should they be required to disperse their unloading crews over other piers when they can operate more conveniently on their own piers. Where the railroads voluntarily and without additional charge undertake to perform a service not included in their rate tariffs, but open to all who choose to avail themselves of it, it is not unreasonable or arbitrary for

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freight as those in charge of the piers might authorize it to move there. There was no suggestion that the railroad was obligated to handle the Government's freight or that it did so.

[15] Appellant's witness, Farrell, General Manager of Stevenson and Young, admitted that it was the practice of the railroads not to unload freight or make wharfage payments on freight handled over a shipper's own pier, and that in his opinion it was a correct practice (R. 171-172).

them to impose limitations which confine it to its legitimate purpose and keep it within reasonable bounds. Furthermore, the shippers who use their own facilities have compensating advantages which shippers using public terminals do not have and which are the reasons for providing their own facilities.

To the extent that appellant's unreasonable practice argument is based on its contention that the export rates include the port services so that the refusal of the railroads to pay the Army the same compensation as they pay to their agent is unreasonable, it is similar to its argument under Section 2 of the Act at pages 25-27 of its brief and has been answered above at pages 18-21). The determination of whether unjust discrimination exists under all the relevant facts is peculiarly within the province of the Commission, and its finding will not be disturbed unless unsupported by evidence or without rational basis, or unless it rests on an erroneous construction of law. *Barringer & Co.* v. *United States*, 319 U. S. 1, 6-7, and cases there cited; *United States* v. *Wabash R. Co.*, 321 U. S. 403, 411.[16] The rule should be no different with respect to reasonableness. We submit that the Commission's finding of absence of unjust discrimination and unreasonableness is subject to none of these infirmities.

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[16] *Union Pacific R. Co.* v. *Updike Grain Co.*, 222 U.S. 215, relied upon by appellant (Br. 38) is not authority to the contrary. That case involved the enforcement of the Commission's order in *Nebraska-Iowa Grain Co.* v. *Union Pacific R.R. Co.*, 15 I.C.C. 90, in which the Commission found that circumstances and conditions did not justify difference in treatment. Thus, the Court upheld the finding of the Commission on an issue of discrimination.

B. ***The Only Obligation Which the Railroads Undertook with Respect to Wharfage and Handling was to Provide Such Service Under the Conditions Stated in Their Terminal Tariffs and Refusal to Contribute Toward the Cost of Such Services to the Army did not Cause the Army to pay More for a Like and Contemporaneous Transportation Service, in Violation of Section 2 of the Interstate Commerce Act***

Appellant argues that the bare fact that the railroads pay their agent $1.00 per ton for providing wharfage and handling services on some freight and refuse to contribute the same amount to the Army for handling its own freight on its own piers evidences unjust discrimination in that it results in the railroads receiving greater compensation from the Army than from shippers for which the services are provided for a like and contemporaneous transportation service (Br. 20-25). This argument is based on a misconstruction of Section 2 which has as its purpose the prohibition of any rebate or other device by which two shippers are compelled to "pay different prices" for shipments over the same line, the same distance, under the same circumstances of carriage. *Interstate Commerce Commission* v. *Baltimore & Ohio R.R. Co.*, 225 U. S. 326, 341. The statute uses the words "charges, demands, collects, or receives from," making it clear that discriminatory charges or payments are prohibited. Certainly, there is no suggestion that the railroad must net the same amount from each shipper.

Appellant's argument is made without any analysis of the source and terms of the obligation involved and with a total disregard of its nature. It is plain that the

obligation has its source in the terminal tariffs of the carriers on file with the Commission; that it applies equally to all shippers, military as well as commercial, that choose to allow their export freight to be handled by the railroad, through its agent, over a public pier; and that *it is an obligation to perform the services and not to make allowances in lieu of performance.* The fact that the railroads choose to perform through an agent compensated by them under a contract between the agent and them does not, in legal contemplation or common business understanding, alter the fact that it is performance for which the railroads have obligated themselves.[17] The agent is responsible to the railroads (R. 184); the railroads are responsible to the shipper. Surely, there can be no doubt that if the freight were damaged through negligent handling, the shipper would look to the rail carrier for redress.

Appellant concedes that where performance is involved, different circumstances (which, in the present context, can only mean special handling to suit the shipper's convenience) "might be significant" (Br. 24-25). It then argues that "where the duty undertaken by the carriers is to absorb terminal charges at a designated pier up to a certain amount, there is plain discrimination if the carrier fails to absorb the same amount for every shipper." (Br. 25). But appellant's concession

[17] Appellant's witness Farrell, General Manager and Stevenson and Young, testified that when Stevenson and Young performed for the railroads; the payments to it of 75 cents per ton for handling were compensation for performing services on behalf of the railroads the same as if it were a railroad employee; that the payments of 25 cents per ton for wharfage were for furnishing the railroads a pier and the wharfage could as well have been compensated for on a yearly rental basis; that the freight "belongs to me, because I am the railroad then", was always in railroad possession through him as its agent, and couldn't be touched by the shipper (R. 174-175).

fits this case, not its succeeding argument. To imply that the obligation assumed, and discharged, by the railroad is to absorb terminal charges up to a certain amount whether or not the services are thereby secured to the shipper is to speak in error. It is undisputed that the qualifying shipper receives wharfage and handling and that is what the railroads have obligated themselves to provide. There is no evidence in this record of contributions up to a certain amount towards the total cost of providing wharfage and handling for any shipper.

We repeat, the only obligation assumed by the railroads is to provide the handling on export freight on public piers without additional charge for all shippers who want the service, and this obligation has been faithfully discharged. These port services are not provided for shippers who control their own shipments on their own piers.[18] As the Commission has properly found, this practice is not unjustly discriminatory. It has repeatedly been sanctioned by the Commission, and the finding here is amply supported by the record and consistent with prior decisions of the Commission.

The graphic example of the shipment of lead pipes for export set forth in appellant's brief (Br. 22-23) should be recast as follows: Assume that the export rate on lead pipes shipped from Columbus, Ohio, to the Army Base piers at Norfolk is $10 per ton. The rail carriers serving the Port of Norfolk have published terminal tariffs under which they have obligated themselves to provide wharfage and handling on export

[18] Exhibit 51 (R. 498) is a list of shippers who operate their own terminals for the handling of their own traffic in the Norfolk-Portsmouth area and for whom the railroads neither handle traffic nor make any allowance (R. 342).

freight without additional charge, subject to certain limitations (*supra*, pp. 15-16). This means that any shipper is entitled to have the freight unloaded at a public pier provided by the rail carrier serving the Port of Norfolk without additional charge. How this is accomplished is no concern of the shipper; but in practice rail carriers not having their own piers contract with a public terminal operator to unload freight at the pier on which it functions as their agent, for which it is compensated by the railroads at the rate of 25 cents per ton for wharfage and 75 cents per ton for unloading (*supra*, p. 6). A shipper may prefer to accept delivery into its possession on its own pier and to handle its freight in its own fashion to suit the needs of its own operation, be it commercial or military. In such case, the railroad delivers the freight to the shipper's pier and its obligation ceases. The charge to each shipper for the line-haul is $10 per ton. While it is, of course, true that the railroad *realizes* $9 per ton on the first shipment and $10 per ton on the second, both shippers *pay* the same $10 per ton for the line-haul, and appellant has not undertaken to prove that the line-haul rates (the $10 per ton in this example) are unreasonable (*supra*, pp. 21-22). The line-haul export rates are arrived at without regard to wharfage and handling and contain no element of compensation for the services (*supra*, pp. 18-21). The only objection with any semblance of validity which the second shipper (the Army in this case) can raise, and the only real issue in this case, is that the limitation of the free wharfage and handling service to the first situation and the failure to provide it in the second is arbitrary, hence an unjust discrimination. It has never been so considered by the

Commission and, as we have shown (*supra*, pp. 27-28), it has a rational and soundly practical basis.

C. *Even If the Railroads Had an Obligation with Respect to Wharfage and Handling under the Line-Haul Export Rates, They Were Released from the Obligation When the Nature of the Army's Operation Was Such as to Prevent Performance and Render the Ordinary Service of the Railroads Unsatisfactory*

We have shown, and appellant has conceded, that its shipments were not entitled to wharfage and handling under the terminal tariffs. We have also shown that no obligation to provide the services is to be found in the line-haul export rate tariffs; that they contained no element of compensation to cover the cost of the services; and that failure to make an allowance to the Army is neither discriminatory nor an unreasonable practice. However, even if there were an obligation under the line-haul rates to provide wharfage and handling, the railroads were relieved of the obligation under the circumstances of this case.

The Commission found that the special requirements of the Army's operation made it necessary that the handling of its freight be done at its own pier facilities, under its control, to suit its own convenience, and that the Army did not wish to use the railroads' pier facilities, thus effectively preventing the railroads from providing the services (R. 22-23). Under such circumstances, there is no obligation upon the railroads to make allowances for unloading and wharfage, for "Whatever transportation service the law requires the carriers to supply, they have the right to furnish.

Atchison, T. & S. F. Ry. Co. v. *United States*, 232 U. S. 199." [19] (R-23).

The Commission has consistently held, as it did here (R. 23), that when a shipper elects to perform a service and when the service of the carrier would not meet the needs and convenience of, or be satisfactory to, the shipper, the carrier's duty to perform the service under its line-haul rate is discharged, and it has no obligation to make an allowance to the shipper for performing the service. *Allowances or Divisions Received by Texas Gulf Sulphur Co.*, 96 I.C.C. 371, 376; *Propriety of Operating Practices—Terminal Services*, 209 I.C.C. 11, 29. The Court has recognized the propriety of the above rule and has consistently upheld the Commission in its application. *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402; *United States* v. *Pan American Petroleum Corp.*, 304 U.S. 156; *United States* v. *United States Smelting, Refining and Mining Co.*, 339 U.S. 186; *United States* v. *Wabash R. Co.*, 321 U.S. 403.

In the *Wabash* case, at page 408, the Court said:

[19] Appellant's attempt to distinguish the principal of *Atchison, T. & S. F. Ry. Co.* v. *United States*, *supra*, is not sound. Here, as there, the railroads provide the services involved even though they do so through an agent. Appellant seeks compensation for providing its own wharfage and handling just as the shippers in that case sought compensation for providing their own icing services. That the railroads here voluntarily assume the obligation to provide port services without additional charge under certain circumstances specified in their published terminal tariffs, rather than being required to do so by law, is no reason for imposing an obligation on them which they are not required by law to assume and have not voluntarily undertaken. To compel the railroads to absorb the cost of the port services where a shipper elects to perform them himself, as appellant seems to suggest on pages 17 and 40 of its brief, would indeed expose them to the "haphazard demands of individual shippers."

> * * * In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence. (citing cases).

The conclusion of the Commission here was amply supported by evidence largely supplied by appellant's witnesses. It was admitted that experience had shown that the complexity of the Army's operation, including the large amount of prestorage planning, the precise overseas requirements, the documentation required, and the need for the maintenance of security required that it be carried on by military personnel and civilian Government employees under the absolute control of the Army (R. 51-52, 66); that the Army in fact maintained absolute control over the movement of freight on the piers (R. 102-103, 123); and that the unloading could not possibly be done at the convenience of the railroads (R. 78). Appellant's witness Farrell, General Manager of Stevenson and Young, described the complex manner of handling the Army freight (R. 177-178). He stated that he would not perform the service required by the Army at the compensation received from the railroads (R. 178), and the record shows that his firm received $2.87 per ton for handling the Army freight (R. 199) in contrast to the $1.00 per ton which it receives for providing wharfage and handling for the railroads.

The railroads discharged their transportation obligation under the line-haul rates when the shipments

were delivered to the Army Base on tracks designated by the Army. Since the determination of the Army to provide its own handling, in its own way, for its own purposes, prevented the railroads from providing the service, and since the ordinary service of the railroads would not meet the requirements of the Army, any duty with respect to port services which the railroads might have had was discharged.

II

The Present Case Is Clearly Distinguishable from the Matter Before the Court of Appeals in United States v. Interstate Commerce Commission, 198 F. 2d 958

Appellant relies heavily on the above case in seeking reversal of the decision of the district court upholding the order of the Commission. At pages 14 and 15 of its Jurisdictional Statement, it contended that there is no substantial difference between the two cases and that the result reached by the three-judge district court in the present case is "irreconcilable with principles declared by the Court of Appeals for the District of Columbia in the first case." While appellant does not take the same stand in its brief on the merits, it nevertheless refers to the earlier case repeatedly in support of its position.

Basic to the decision of the court of appeals was its view that under the terms of the applicable terminal tariff in that case, the Army was entitled to wharfage and handling on its freight even after it took over the piers (pp. 965-966).[20] The court viewed the failure of the railroads to provide the services as "a departure

[20] As the Commission (R. 8) and the district court (R. 33) concluded in the present case, the tariffs in the two cases differ materially. The different terminal tariff applicable to the shipments involved in the prior case is set forth in 198 F. 2d at page 965.

from the filed tariffs" (p. 970). The court's view of that case was also colored by its impression that the facilities available to the railroads were inadequate to accommodate the military freight so that the Army's shipment of freight over its own piers "was not a mere matter of commercial convenience or advantage" (p. 972).[21]

Both the Commission and the district court recognized the basic differences in the two cases. The Commission had the following to say about the first case (R. 8-9):

> The proceeding herein is a different case from that referred to above and relates to shipments moving since May 1, 1951, long after our action in the prior proceeding had become subject to court review, and some 7 months before that case was argued to the court of appeals. The tariffs and physical operations, with respect to complainant's shipments here involved, materially differ from those involved in the prior proceeding, as is more fully set forth hereinafter. The only similarity between the two proceedings is that practically the same parties oppose each other, the same general character of commodities are involved, and the place where switching operations occurred is the same. Consideration and decision in the prior proceedings does not legally relate to or control the consideration and decision herein. It is not believed that the decision and opinion of the court

[21] The logic of the court's view is open to question. Since the piers were available to the railroads as a public facility before the Army took them over, the action of the Army in making them its own did not increase the available pier facilities, and must have been taken for other reasons.

> of appeals in the prior case, is determinative of the factual and legal questions presented herein. However our consideration and action in this proceeding will carefully take notice of the opinion of the court of appeals in the prior proceeding, and conform to legal principles therein stated, as we understand them to apply to the facts and legal situations here involved.

Similarly, the district court took the view that the prior decision did not require reversal of the instant case, saying (R. 33-34):

> The opinion of the United States Court of Appeals for the District of Columbia in *United States* v. *Interstate Commerce Commission, et al.*, 91 U.S. App. D.C. 178, 198 F. 2d 958 (1952), in a prior proceeding involving wharfage and handling costs at the same Army Base Piers during World War II, upon which plaintiff heavily relies, does not impel reversal of the Commission's order in this case. The tariffs here under consideration, which are the sole basis of plaintiff's action, are materially different. They specifically and clearly define the conditions under which wharfage and handling are included in the freight rates. The shipments of the United States here in question do not conform to those conditions. Hence, under such circumstances, the United States, like any other shipper similarly situated, is not entitled to such terminal services or any allowance therefor. The record before the Commission and the Commission's findings in the instant case are not inadequate, as they were held to be in the earlier proceeding, and the facts herein are vitally different.

In accordance with the decision of the court of appeals in 198 F. 2d 958, the Commission assigned the case for further hearing. Since the case had been tried during the war, when full information could not be secured, the defendant's subpoenaed the Army officers and civilian personnel who had been in charge of the Army Base operation. Upon the entire record, the Commission made further findings and concluded that the Army was not entitled to allowances for wharfage and handling services. *United States* v. *Aberdeen & Rockfish R. Co.*, 294 I.C.C. 203.[22]

CONCLUSION

If appellant's position is sound, other shippers who take control of, and handle, their own shipments on their own piers to suit their own convenience, as does the Army, will similarly be entitled to allowances. A practice sanctioned by the Commission and accepted by carriers and shippers alike as just and reasonable will be declared illegal. In the process, the entire body of law relative to this subject established by the Commission over many years will have to be revised.[23]

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[22] Appellant states that the question of seeking review of this case, decided January 17, 1956, is under consideration by the Government (Br. 8, fn. 3).

[23] For example, that export rates *per se* do not include wharfage and handling; that such services may be provided without additional charge under certain stated conditions and withheld otherwise, pursuant to published tariffs and customary practices; that shippers who provide their wharfs and handle their own shipments are not entitled to allowances; and that when a shipper elects to forego the service offered by a carrier and perform the service itself because the service of the carrier would not meet the needs or suit the convenience of the shipper, the carrier's duty to perform is discharged and it has no obligation to make an allowance to the shipper.

The judgment of the district court should be affirmed.

Respectfully submitted,

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